

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN M. VALESANO

Claimant

VS.

STORMONT VAIL REGIONAL MEDICAL CENTER

Self-Insured Respondent

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Docket No. 1,050,725

ORDER

Respondent requests review of the January 13, 2012, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on April 10, 2012.

APPEARANCES

Judy A. Pope of Leawood, Kansas, appeared for claimant. James C. Wright of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The ALJ awarded claimant permanent partial disability benefits (PPD) based on a 13.4 percent whole body functional impairment for injuries to her neck and left shoulder. Claimant's average weekly wage (AWW) was determined to be \$1,269.70, which included wages from two jobs claimant performed for respondent at the time of the accident. ALJ Avery ordered that claimant's chiropractic bills with Dr. Stacy Struble Landis, from whom claimant received treatment on her own for her neck, be paid as authorized care.

Respondent contends claimant's award of PPD should be limited to the impairment to claimant's left shoulder. Respondent asserts claimant was injured while performing only her full-time hourly job, not her other part-time position, and that her wages from only the full-time job should be included in claimant's average weekly wage. In its brief to the

Board, respondent also maintains that Dr. Michael J. Poppa's rating should not be considered in the determination of claimant's shoulder impairment and that there was insufficient foundation to support the ALJ's decision requiring respondent to pay for claimant's chiropractic treatment.

Claimant contends the award should be affirmed in all respects.

The issues before the Board on this appeal are:

(1) Whether the ALJ erred in computing claimant's AWW, specifically whether the wages earned by claimant in connection with her part-time job for respondent should be included in the AWW calculation.

(2) Whether the ALJ erred in ordering respondent to pay, as authorized treatment, for the chiropractic care claimant received from Dr. Landis.

(3) Whether the ALJ erred in determining the nature and extent of claimant's disability.

(a) Whether the ALJ erred in considering the rating of Dr. Michael J. Poppa in finding the impairment of function to claimant's left shoulder.

(b) Whether the ALJ erred in finding that claimant was entitled to PPD based on a whole body disability as opposed to only a scheduled injury to the left shoulder.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On the date of the regular hearing claimant was 49 years old. She sustained a compensable accidental injury on December 9, 2009, when she slipped and fell on a wet floor inside respondent's hospital. The accident caused an anterior inferior dislocation of claimant's nondominant left shoulder, which was manually reduced in the emergency room (ER) at respondent on the day of the accident. When injured, claimant was employed by respondent performing two jobs:

(1) A full-time position as a department assistant for which she earned \$16.97 per hour. She averaged 2 hours per week overtime at time and a half.

(2) A part-time position as a telemetry monitor technician, which required claimant to watch patients' heart monitors. Claimant described this job as a "standby on-call job."¹ In this position claimant worked approximately 20 hours a week at \$27.00 per hour.

Claimant received her wages for both jobs in a single paycheck. Claimant's accrual of points for purposes of fringe benefits was based on both jobs.

Following her ER visit on December 9, 2009, claimant received authorized treatment for the left shoulder from Dr. Michael T. McCoy, an orthopedic surgeon. Dr. McCoy had office visits with claimant on four occasions from December 11, 2009, through March 15, 2010. Claimant's shoulder was treated conservatively with a sling, physical therapy, and light duty restrictions. Claimant was released from treatment by Dr. McCoy on March 15, 2010.

Claimant did not complain of any pain or other symptoms in her neck at her initial ER visit or in the four office visits she had with Dr. McCoy. Claimant testified she developed neck pain "around March"² 2010. She first noticed neck pain and stiffness on awakening at night. Claimant attributed her development of neck pain to the immobilization of her left arm resulting from her use of the sling and to the changes in her positioning at night due to the left shoulder injury. She had no cervical symptoms prior to the accident, nor was claimant receiving treatment for the neck at that time. Claimant did previously receive chiropractic treatment for the neck, but not since June 2007. After the accident claimant received chiropractic treatment for her neck on her own from Dr. Landis.

Claimant testified she continued to have symptoms she attributed to the 2009 accident, consisting of left shoulder pain and numbness, and neck pain and stiffness. With "certain movements"³ with the left shoulder claimant had decreased range of motion and "slight pain."⁴ Using a keyboard, reaching, and lifting increased claimant's symptoms.

Dr. Michael J. Poppa, an occupational medicine physician, testified that he examined claimant on one occasion, July 13, 2010, at the request of claimant's counsel. The history received by Dr. Poppa was that "Ms. Valesano states she was performing her regular job duties when she sustained an injury to her left arm, shoulder and neck."⁵ Dr. Poppa received no history regarding the time or manner of the onset of her neck

¹ R.H. Trans. at 13.

² *Id.*, at 8.

³ *Id.*, at 6.

⁴ *Id.*

⁵ Poppa Depo., Ex. 2 at 1.

complaints.⁶ In addition to the left shoulder dislocation Dr. Poppa's diagnostic impression was that claimant sustained chronic cervical musculoligamentous sprain-strain/chronic myofascitis and myofascial pain. With regard to causation, Dr. Poppa opined in his narrative report that claimant's "work related injury and employment at [respondent] was the direct and proximate cause of her work related injury with residuals involving her left upper extremity/shoulder and cervical spine."⁷

By the time Dr. Poppa testified by deposition on September 27, 2011, he apparently decided that as a result of claimant's left shoulder injury, claimant developed cervical pain from "muscle guarding."⁸ Dr. Poppa reasoned that "any time you use a sling, you run the risk of producing increased muscle tension or pain in surrounding muscles such as trapezius and neck."⁹ Dr. Poppa did not consider claimant's neck pain to be referred pain from the left shoulder but rather mechanical in nature.

Dr. Poppa rated claimant's permanent impairment of function at 25 percent to the left upper extremity at the shoulder, which converts under the AMA *Guides*¹⁰ to 15 percent to the whole body, plus 5 percent to the body for the cervical spine. Dr. Poppa's overall rating was 19% to the body as a whole.

Dr. Pat D. Do, an orthopedic surgeon, was appointed by the ALJ to conduct an independent medical evaluation (IME) of claimant's alleged cervical spine injury. Dr. Do saw claimant initially on June 6, 2011. He recommended diagnostic testing, physical therapy, and medication. The ALJ entered an order on June 22, 2011, authorizing medical treatment with Dr. Do. Respondent complied with the order. The testing consisted of plain x-rays and an MRI scan of the cervical spine, which revealed no neurological injury but did show multilevel degenerative disc disease. Claimant attended follow-up appointments with Dr. Do on August 3 and 30, 2011. Dr. Do's diagnosis was myofascial neck pain, which he testified was referred pain from the left shoulder.¹¹ Dr. Do testified that claimant told him she had hurt her neck as a consequence of falling on her left shoulder and that he believed that claimant's fall caused the onset of claimant's neck pain.¹² However, Dr. Do's narrative

⁶ *Id.*

⁷ *Id.*, Ex. 2 at 5.

⁸ *Id.*, at 8.

⁹ *Id.*, at 32.

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹¹ Do Depo. at 58 and Ex. B at 2.

¹² *Id.*, at 8, 9.

report indicates that claimant developed neck pain during the course of the treatment she received for her left shoulder.¹³

With specific reference to causation, Dr. Do opined that, given the lack of neck complaints initially, and for a period of three months after the accident, claimant's neck symptoms probably did not result from the original fall.¹⁴ However, Dr. Do testified as follows in response to a question regarding how claimant's neck pain developed after the December 9, 2009, event:

Well, it's very common. I see it every day. Folks have a rotator cuff injury or shoulder injury, and they develop neck pain after their shoulder surgery or their injury at some point in time later because the same muscles that insert in to the shoulder area is, naturally, they get fatigued and/or go in to spasm to try to protect an injured shoulder. For instance, if you have a broken leg and you are out in the field a doctor is going to put, or paramedics, will put a couple of sticks on it, or boy scouts will, to protect those broken bones your *[sic]*. Body instinctively does the same thing, they go in to spasm, they want to protect that injured shoulder that just got dislocated, for instance. So, no, when she says she has neck pain that developed later, I absolutely believe her, and I think we should treat patients from that. They do have muscle pain for that. . . .¹⁵

Dr. Do opined claimant's presentation fell within DRE Cervicothoracic Category II of the *Guides* for a 5 percent permanent impairment to the whole body.¹⁶ Dr. Do did not rate claimant's shoulder. Dr. Do's opinions are somewhat unclear because he appears to confuse the concepts of causation and impairment of function.

Dr. McCoy testified that he did not examine or treat claimant's neck because she did not complain of neck symptoms during the period in which she was under his care. He did opine that neck pain would be "an unusual complaint from the shoulder."¹⁷ Dr. McCoy rated claimant's permanent impairment at 5 percent of the left upper extremity at the shoulder. He did not rate claimant's cervical spine.

Dr. Peter V. Bieri examined claimant on January 4, 2011, pursuant to an order for a neutral IME issued by the ALJ. Dr. Bieri received a history that claimant sustained injury to her left shoulder but subsequently had pain radiating into the left neck. Claimant told

¹³ *Id.*, Ex. B at 1.

¹⁴ *Id.*, at 12.

¹⁵ *Id.*, at 46-47.

¹⁶ *Id.*, Ex. F.

¹⁷ McCoy Depo. at 22.

Dr. Bieri that she experienced neck pain on occasion but not constantly and that she experienced pain at night requiring postural adjustment. Dr. Bieri opined that claimant had "no neck injury related to the incident in question."¹⁸ Claimant's neck pain was secondary to her shoulder injury and was referred pain from the left shoulder.¹⁹ However, Dr. Bieri admitted that claimant's neck pain could very well have come from guarding the left shoulder injury and that such guarding can encompass changing the way a person sleeps to protect the shoulder at night.²⁰

In Dr. Bieri's opinion, claimant had no permanent functional impairment to the cervical spine, but he did provide a 12 percent impairment rating to the left shoulder.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to consider the medical testimony along with the testimony of the claimant and any other witness that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.²¹

K.S.A. 2009 Supp. 44-510h states in pertinent part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the

¹⁸ Bieri Depo. at 9.

¹⁹ *Id.*, at 20 and Ex. B at 5.

²⁰ *Id.*, at 32.

²¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

director's discretion, so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The case law interpreting the quoted language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.²²

The employee, without approval of the employer, may consult with a health care provider for examination, diagnosis or treatment, but the employer is only liable for fees and charges of \$500, under such circumstance.²³

K.S.A. 44-510j(h) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

K.S.A. 2009 Supp. 44-511 provides in relevant part:

(a) As used in this section:

(1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source.

. . . .

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

K.S.A. 44-510d provides in part:

(a) . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and

²² See *Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

²³ K.S.A. 2009 Supp. 44-510h(b)(2).

compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e(a) provides in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Bryant*,²⁴ the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,²⁵ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from

²⁴ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

²⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

In determining whether a claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers compensation benefits available.²⁶

ANALYSIS

The ALJ did not err in computing claimant's AWW. There is no dispute that claimant performed more than one job for respondent at the time of the injury. However, assuming the accuracy of respondent's assertion that when she was injured claimant was only performing duties connected to her full-time job, it is nevertheless appropriate to include claimant's earnings from both positions in calculating the AWW.

Although claimant performed two jobs for respondent, she had only one employment. Under K.S.A. 2009 Supp. 44-511(a) "wage" is defined as "money" plus "additional compensation," as those terms are specifically defined. "Wage" is defined as the "total . . . which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident" There is no language in K.S.A. 2009 Supp. 44-511, or elsewhere in the Act, which suggests that only one of claimant's jobs should be included in the computation of the AWW under these circumstances. The language of the wage statute is clear and unambiguous. In statutory interpretation, courts presume that the legislature effected its intent through the language of the statute and will generally avoid applying canons of construction, or referring to legislative history, where statutory language is plainly and unambiguously expressed.²⁷

There is no documentary evidence in the record concerning claimant's wages. Hence, claimant's testimony is the only evidence to consider. Claimant's full-time position with respondent paid \$16.97 per hour, plus an average of 2 hours a week overtime at time and a half. As found by the ALJ, the wage for the full-time job, pursuant to K.S.A. 2009 Supp. 44-511(b)(4), is \$729.70. The part-time position paid \$27.00 per hour for 20 hours a week, which totals \$540.00. The ALJ's method of simply adding together the AWW from both positions is reasonable under the statute and is adopted by the Board. Claimant's AWW is \$1,269.70.

The Board also adopts the ALJ's determination that as a consequence of her December 9, 2009, accident, claimant sustained permanent impairment of function of 14 percent to the left shoulder, which consists of an average of the left shoulder ratings of

²⁶ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

²⁷ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-8, 214 P.3d 676 (2009).

Drs. Poppa, McCoy, and Bieri, and a 5 percent impairment to the whole body for the cervical spine. The left shoulder and neck ratings compute under the *Guides* to an aggregate rating of 13.4 percent to the body as a whole. Claimant is entitled to PPD based on that permanent impairment of function.

Claimant testified she attributed her neck symptoms to the immobilization of her left arm due to her use of a sling and to postural changes while sleeping necessitated by the injury.

Respondent calls into question the credibility of Dr. Poppa's testimony and there is some evidence to support respondent's position. The testimony of one of the physicians appointed by the ALJ, Dr. Bieri, casts doubt on some of the opinions expressed by Dr. Poppa and, moreover, the Board notes Dr. Poppa's tendency in his deposition testimony to be nonresponsive and evasive on cross-examination. Nevertheless, considering the entire record, the preponderance of the credible evidence supports the findings of the ALJ regarding functional impairment. Dr. Poppa's qualifications to testify as a medical expert were not challenged by respondent. The ALJ did not err in considering Dr. Poppa's testimony and opinions.

Claimant testified that her neck pain commenced around March 2010. Accordingly, the absence of neck complaints when claimant was seen in the ER on the date of accident and in the four office visits claimant attended with Dr. McCoy from December 2009 until March 2010 is not inconsistent with claimant's testimony. The history received by Dr. Do, who was appointed by the ALJ to evaluate claimant's cervical spine, was that claimant developed neck pain in the course of treatment for the left shoulder, not in the December 2009 slip and fall. Dr. Do diagnosed the neck as myofascial neck pain which he felt was referred to the left neck from the left shoulder injury. Dr. Do found that claimant's cervical pain affected the paraspinal muscles in the neck.²⁸ Dr. Do testified that neck pain resulting from a shoulder injury is very common. Dr. Do rated claimant's cervical spine at 5 percent to the body, the same rating found by Dr. Poppa.

Dr. Poppa found claimant developed neck pain due to muscle guarding from claimant's use of the sling on her left upper extremity. Dr. Bieri, although he found no injury and no permanent impairment to the cervical spine, did testify that claimant had neck pain which he says developed as a result of referred pain into the neck from the shoulder. Dr. Bieri also admitted that claimant's neck pain "could very well have come from guarding

. . . .²⁹

²⁸ Do. Depo. at 13, 14.

²⁹ Bieri Depo. at 32.

Although the evidence is conflicting, claimant sustained her burden of proof that her accident resulted in injury and permanent impairment of function to her neck as well as her left shoulder. As noted above, it is not the location of the trauma, but the situs of the resulting disability, which determines the compensation to which a claimant is entitled. Claimant's cervical injury and functional impairment were natural and probable consequences of the left shoulder injury and both must be considered in determining the nature and extent of claimant's disability.

The chiropractic bills incurred by claimant in connection with the care she secured for her neck from Dr. Landis were properly ordered paid by respondent as authorized treatment. The evidence is undisputed that claimant requested from respondent treatment for her neck, but no treatment was authorized. Claimant sought treatment on her own from Dr. Landis and, under these circumstances, respondent is responsible to pay for such treatment until the ALJ entered his Order for Medical Treatment on June 22, 2011. At that point respondent did authorize treatment for the neck in compliance with the order. Any bills incurred by claimant with Dr. Landis after the date of the order shall be paid up to the \$500 maximum for unauthorized medical to the extent the unauthorized medical allowance has not already been paid.

CONCLUSION

(1) Claimant's AWW is \$1,269.70, consisting of wages from both the full-time job and the part-time job claimant was performing for respondent at the time of the injury.

(2) The ALJ did not err in ordering respondent to pay for the treatment claimant received from Dr. Landis as authorized treatment. However, any treatment received by claimant after June 22, 2011, is payable as unauthorized medical up to the statutory maximum of \$500, to the extent that such maximum allowance has not already been paid.

(3) As a result of the accidental injury, claimant sustained injuries to her left shoulder and, as a natural and probable consequence of the shoulder injury, to the cervical spine. Claimant is entitled to PPD based on a 13.4 percent impairment of function to the whole body. In determining the nature and extent of claimant's disability, the ALJ did not err in considering the testimony and opinions of Dr. Poppa.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

³⁰ K.S.A. 2011 Supp. 44-555c(k).

AWARD

WHEREFORE, the January 13, 2012, Award entered by ALJ Brad E. Avery is hereby modified per finding number (2) above but is affirmed in all other respects.

IT IS SO ORDERED.

Dated this ____ day of June, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge